Supreme Court, U. S.
FILED
JUN 26 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1604

Supreme Court, U.S.
FILED
OCT 10 1972
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PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS,

Petitioner,

—against—

THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

and

BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

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THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, *et al.*,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

MOTION OF THE REPUBLIC OF LIBERIA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Republic of Liberia, a sovereign State under whose laws and Flag the vessels involved herein are registered, hereby respectfully moves for leave to file a brief *amicus curiae*. Petitioner has consented to the filing of such a brief. Respondents have not.

The Republic of Liberia's brief will be limited to the single but crucial issue of whether a writ of *certiorari* should issue from this Honorable Court to the United States Court of Appeals for the Fifth Circuit to review a decision of that Court which refuses to uphold and apply

a Treaty currently in force between the United States of America and the Republic of Liberia (Treaty of Friendship, Commerce and Navigation, 1938, 54 Stat. 1739). This issue arises by virtue of the March 2, 1972, decision of the Fifth Circuit, affirming a holding by the United States District Court for the Southern District of Texas, Houston Division, that it lacked jurisdiction to restrain respondents from picketing vessels of the Republic of Liberia lying in the Port of Houston, Texas. Neither of the decisions below has as yet been officially reported, but the texts of both may be found in the Appendix prepared by Petitioner.

The Republic of Liberia has a legitimate concern with these proceedings. Over 38 million tons of merchant shipping are registered under the laws of the Republic of Liberia. Over 15% of all merchant ships in the world fly the Liberian Flag, and the tonnage of the merchant fleet of Liberia is, by a considerable margin, the largest in the world. The maintenance of its status as a principal maritime nation is a matter of highest importance to the Republic of Liberia.

Liberia is eager to protect its shipping from discriminatory attack by any interest and to maintain its jurisdiction and control over matters of internal order and economy aboard the vessels of its Flag under generally recognized principles of international law as well as provisions of the governing Treaty with the United States.

Liberia believes that, possibly because of emphasis on other points, the international law and treaty considerations in which it is so particularly and vitally interested were inadequately developed and considered by the courts below and it fears that they may not be adequately de-

veloped and presented here. It is for this reason that the Republic of Liberia requests this Honorable Court to grant its motion.

Respectfully submitted,

.....

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Dated: June 23, 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS,

Petitioner,

—against—

THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

The Republic of Liberia respectfully urges this Honorable Court to grant the petition herein and to cause a writ of *certiorari* to issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 2, 1972, and the judgment entered pursuant thereto on March 24, 1972.

Opinions Below

The opinions and orders of the Courts below have not yet been officially reported but appear in the Appendix prepared by Petitioner.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 24, 1972, and the Petition for Certiorari herein was filed within 90 days [28 U.S.C. § 2101 (c)] of that date. Petitioner invokes the jurisdiction of this Honorable Court under 28 U.S.C. § 1254 (1).

Questions Presented

Whether the Norris-LaGuardia Act (March 23, 1932, c. 90; 47 Stat. 70 *et seq.;* 29 U.S.C. § 101 *et seq.*) is applicable to a controversy of the sort at issue here, and whether, if otherwise applicable, that Act should be applied to prevent the courts of this Nation from upholding and enforcing specific treaty obligations of the United States of America.

Statutory Provisions Involved

UNITED STATES CODE, TITLE 29

§ 101. *Issuance of restraining orders and injunctions; limitations; public policy*

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§ 102. *Public policy in labor matters declared*

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

§ 113. *Definitions of terms and words used in chapter*

When used in this chapter, and for the purposes of this chapter:

• • •

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

Treaty Provisions Involved

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND LIBERIA. SIGNED AT MONROVIA, AUGUST 8, 1938. (54 STAT. 1739, T.S. No. 956).

ARTICLE I

. . . . .

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

. . . . .

ARTICLE VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

Article XIV

The merchant or other private vessels and cargoes of one of the High Contracting Parties shall, within the territorial waters and harbors of the other Party in all respects and unconditionally be accorded the same treatment as the vessel and cargoes of that Party, irrespective of the port of departure of the vessel, or the port of destination, and irrespective of the origin or the destination of the cargo. It is especially agreed that no duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories or territorial waters of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels.

Article XV

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

Article XVI

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the

other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the High Contracting Parties is exempt from the provisions of this Article and from the other provisions of this Treaty, and is to be regulated according to the laws of each High Contracting Party in relation thereto. It is agreed, however, that nationals and vessels of either High Contracting Party shall within the territories of the other enjoy with respect to the coasting trade most-favored-nation treatment.

Statement of the Case

The Republic of Liberia adopts Petitioner's statement of the case.

REASONS FOR GRANTING THE WRIT

The decisions below are not merely erroneous, but must have a serious and growing adverse impact upon both the foreign relations and the economies of the United States of America and the Republic of Liberia.

The courts below, going upon the narrowest conceivable interpretation of the Norris-LaGuardia Act, refused even to consider the basic issue of flagrant treaty violations committed by Respondents and their individual members.[1] What makes the decision of the Fifth Circuit Court of Appeals especially ripe for review, however, is that neither of the courts below, nor this Honorable Court in *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365 (1960), has given any consideration to a most vital question, *viz.*: Is there an irreconcilable conflict between the public policy restraining the jurisdiction of the courts of the United States under the Norris-LaGuardia Act and the public policy upholding mutual rights and obligations under solemn international treaties? And, if so, which policy must prevail?

If an irreconcilable conflict of public policy does exist and if the policy expressed in the Norris-LaGuardia Act dominates the policy upholding the rights and obligations of treaties, then the decision of the court below may stand. But if there is no direct conflict of public policy, or if a

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[1] That both courts below accorded in declining to find jurisdiction does not, of course, determine whether the decision of the Fifth Circuit should be reviewed. In *Marine Cooks*, 362 U.S. 365 (1960), both lower courts were in accord; this Honorable Court granted *certiorari* and reversed.

conflict exists and the policy upholding treaty rights and obligations is of paramount importance, then the decision of the court below should be reversed.

The issue is of absolutely crucial international importance. A treaty right ignored is a treaty right abrogated; and a treaty obligation ignored becomes no obligation at all. Nowhere are such treaty questions more important than here, where the national security and international commerce of the contracting states are directly and obviously affected by the outcome.

A high percentage of imports to, and exports from, the United States of America are carried by Liberian vessels, pursuant to the FCN Treaty. If vessels of the Republic of Liberia may actually be prevented by Respondents from unloading or receiving cargoes at ports of the United States of America, the result must be that both the economies of Liberia and the United States will suffer, perhaps severely.

But the vital questions of law, both domestic and international, overshadow even the considerable economic impact. For the Treaty here in question between the United States and Liberia undertakes that:

> "... there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties ... shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation." [2]

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[2] Article VII.

and that

> "Merchant vessels . . . under the flag of either of the High Contracting Parties *shall be permitted to discharge* portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party . . . and they *shall be permitted to load* in like manner at different ports in the same voyage outward . . . ."[3]

The reciprocal guarantee there given is stated boldly and unambiguously; but if any construction were needed, this Honorable Court has declared the rule which should be applied:

> "Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. Shanks v. Dupont, 3 Pet. 242, 7 L.Ed. 666. Such is the settled rule in this court." *Hauenstein* v. *Lynham*, 100 U.S. 483, 487 (1879).

As against these declarations, and the status of treaties as the Law of this Land,[4] it is untenable that there should be an overriding public policy which would deprive the courts of the United States of jurisdiction to consider whether treaty rights have been violated. Surely, if such an overriding public policy is to be imputed to the Norris-LaGuardia Act, it must be evident within the Act itself; and Congress has, almost uniquely, made a careful declaration in Section 2 of that Act (29 U.S.C. § 102):

> "In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the

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[3] Article XVI. Italics supplied.

[4] Constitution of the United States of America, Article VI, cl. 2.

> United States, as such jurisdiction and authority are defined and limited in this chapter, *the public policy of the United States is declared as follows:*" [Italics supplied]

The same section then goes on to state, in two phrases, the governing considerations of public policy, *viz.*:

> (1) that the individual worker "have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment", and
>
> (2) that he "shall be free from the interference, restraint or coercion of *employers of labor, or their agents,* in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." [Italics supplied]

As to the first clause quoted above, the most striking fact of this case is that Respondents have not sought at any stage to organize the crews of these Liberian vessels. Those crews are already organized and represented by foreign maritime unions between whom and the shipowners collective bargaining agreements are currently in force. Nor have Respondents or their individual members sought work aboard the vessels.

As to the second clause, neither Petitioner nor the Republic of Liberia is an "employer of [seagoing] labor" nor an "agent" thereof. While it is clear that the direct

employer-employee relationship is not a prerequisite to the application of the Norris-LaGuardia Act, the language of the Act itself clearly contemplates the existence of an employer-employee "nexus" in the sense that, proximately or potentially, it is in the employment context that the Act seeks to make the worker "free from the interference, restraint, or coercion of employers of labor". Neither Petitioner nor the Republic of Liberia are in the proximate or potential relation to Respondents which the Act contemplates; there is no nexus here.

Liberia submits that there is no conflict in this case between the public policy expressed in the Norris-LaGuardia Act and the public policy upholding treaty rights and obligations. The non-existence of a conflict means that the public policy embodied in the governing Treaty must be enforced—and the decision below must be reversed.

Should this Honorable Court feel, however, that despite the total absence of an employer-employee nexus a conflict of public policies does exist, then it must necessarily determine which will prevail. In that event, the Republic of Liberia submits that the public policy upholding treaty rights and obligations must prevail.

The sanctity of a treaty rests upon a pledge, made before the world by the states party to it, that it is a solemn international contract, made for consideration, which each party commits itself to uphold and which each party may hold the other to. Moreover, the treaty here drawn into consideration was made and executed more than six years after the enactment of the Norris-LaGuardia Act and, as this Honorable Court has frequently declared, the later

Treaty will prevail over the prior statute. See, *e.g., Hijo* v. *United States,* 194 U.S. 315, 324 (1904).[5]

Mr. Justice Black, writing for a majority of this Honorable Court in *Marine Cooks,* 362 U.S. 365, said:

> "As we pointed out in the *Benz* case, a ship that voluntarily enters the territorial limits of this country subjects itself to our laws and jurisdiction as they exist." [at p. 372]

But the Treaty involved here was the law when these Liberian vessels entered the territorial waters of the United States, and it guarantees the "freedom of commerce and navigation" which is explicitly set out in its several Articles.[6] As to jurisdiction, the Treaty is not only international law but is the "Law of the Land" under the Constitution of the United States of America. What meaning can such law have if courts have no jurisdiction to enforce it? Without such jurisdiction it is meaningless as "law", and it cannot have been the intent of the framers of the Constitution of this Nation that a Treaty should be a mere act of futility, without jurisdiction in the courts of the Contracting States to enforce its specific provisions.[7] Where such overriding considerations of public policy enter, this Honorable Court has specifically held that the courts of the United States *do* have jurisdiction, and that the strictures of the Norris-LaGuardia Act must be accom-

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[5] And for a decision to the same effect in the very courts below here, see *United States* v. *85,237 Acres of Land, etc.,* 157 F. Supp. 150, 155 (S.D. Tex., 1957), affirmed 252 F.2d 116 (5 Cir. 1958).

[6] Articles VII, XIV, XVI.

[7] The principle of access to the courts to enforce Treaty and other rights is embodied generally in Article I of the FCN Treaty.

modated to the public policy in question. *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970). The underlying principle is not a novel one; it has long-standing application to cases in which foreign relations and foreign commerce are involved. *Brown* v. *Duchesne,* 60 U.S. (19 How.) 183, 197 (1857).

Should there be a conflict between the public policy of the Norris-LaGuardia Act and the public policy upholding treaty rights and obligations, it is clear that the overriding public policy in favor of international comity, observance of international law, stability in foreign relations and freedom in transaction of foreign commerce clearly call for application of the principle of accommodation in the instant case. The courts below have refused to apply that principle as enunciated by this Honorable Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Dated: June 23, 1972

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 1972, three copies of the within Motion and Brief *amicus curiae* were mailed, postage prepaid, to Counsel for the parties listed below. I further certify that all parties required to be served have been served.

.....

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